IN THE SUPREME COURT OF FLORIDA

Case No. SCO3-23

L.T. Case No.'s: 4D02-2353
AND 4D02-2401
(consolidated)

CHARLIE CRIST, JR., Attorney General of the State of Florida, Etc., Et Al.	v.	REP. CORRINE BROWN, REP. ALCEE HASTINGS, REP. CARRIE MEEK, and SALLIE STEPHENS,
Petitioners		Respondents

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

BRIEF OF RESPONDENTS ON JURISDICTION

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STATEMENT OF JURISDICTION

This Court does not have jurisdiction to hear this matter because the Opinion of the Fourth District Court of Appeal does not conflict with decisions of this Court on the same question of law.

STATEMENT OF THE CASE AND FACTS

Congresswoman Corrine Brown, Congressman Alcee Hastings, Congresswoman Carrie Meek, and Sallie Stephens, a qualified voter (Respondents in this case and Appellants/Plaintiffs below), brought an appeal to the Fourth District Court of Appeal ("Fourth District"), challenging the Trial Court's *sua sponte* dismissal of their claims, on the basis that there was no jurisdiction for the Circuit Court to adjudicate a Florida constitutional challenge to a Florida law apportioning congressional districts. The then President of the Florida Senate, John McKay, (Appellant/Intervenor below) also appealed the Trial Court's denial of his request to intervene in the Circuit Court.

The Fourth District rendered its decision in Case Nos. 4D02-2353 and 4D02-2401 on October 11, 2002 reversing the two rulings of the Circuit Court which were separately appealed by the Plaintiffs and Intervenor below, and which the Fourth District consolidated for review. (*See* Appendix 1 of *Brief of Petitioners on Jurisdiction*) The Fourth District held that the Circuit Court had subject matter jurisdiction to hear the Plaintiffs' claims. This

ruling is not the subject of this appeal.[1] (*Id.)*

In reversing the Circuit Court's denial of the Senate President's Motion to Intervene, the Fourth District held:

> Finally, we *reverse* the order denying the motion of the President of the Florida Senate to intervene in the action. . . . While we agree that the President of the Florida Senate is not an indispensable party to this gerrymandering claim, we nevertheless do *hold* that he is a proper party, one certainly with a cognizable interest in the action.

(Emphasis supplied.) (*Id.*) Thus, the Fourth District held that the President of the Florida Senate was a proper, but not indispensable party to intervene in this case before the Circuit Court.

The Fourth District denied rehearing on December 20, 2002. The Attorney General served his *Notice to Invoke Discretionary Jurisdiction* on January 2, 2003. The Attorney General did not move to stay issuance of the Mandate in this case, and on January 10, 2002 the Mandate from the Fourth District issued. On January 16, 2003, the Respondents filed in the Circuit Court *Plaintiffs' Notice of Voluntary Dismissal Without Prejudice as to State Of Florida, Charlie Crist (as Attorney General) and Ken Detzner (as Secretary of State).*

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[1] In Case No. SC03-128, the Secretary of State seeks to invoke this Court's jurisdiction on this issue.

On January 22, 2003, Respondents filed in the Circuit Court *Plaintiffs' Notice of Voluntary Dismissal Without Prejudice as to Jim King, President of the Florida Senate*.

SUMMARY OF THE ARGUMENT

There is no express and direct conflict with any decisions of another district court or this Court as the Fourth District did not hold that the Attorney General is an indispensable party to all actions challenging the constitutionality of all Florida legislation. Whether or not the Attorney General is an indispensable party was not raised on appeal to the Fourth District. The Attorney General mischaracterizes the Fourth District's dicta, contained in the last paragraph and footnote 9 of its Opinion, as a holding on indispensable parties. Such dicta narrowly addresses the issue on appeal in this action: whether or not the President of the Florida Senate is a proper party in this reapportionment case. Furthermore, such footnote only stated that the Attorney General shall be served and is entitled to be heard in declaratory judgment actions challenging the constitutionality of Florida Statutes; in this case, the Attorney General is an indispensable party; and in reapportionment cases, all other individual parties are merely proper. The Attorney General has misconstrued the Fourth District's dicta for a holding on an issue not raised in the underlying appeal.

Additionally, there is no case or controversy for this Court to review since the Respondents voluntarily dismissed all adverse parties after the issuance of the Mandate. If this Court were to issue an opinion in this case, it would merely be an advisory opinion. This Court should dismiss this case.

ARGUMENT

I. NO CONFLICT EXISTS ON ANY QUESTION OF LAW SUFFICIENT TO INVOKE THIS COURT'S DISCRETIONARY JURISDICTION PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.030(a)(2)(A)(iv).

In order to invoke this Court's discretionary jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv), the Fourth District's opinion must expressly *and* directly conflict with the opinion of another district court of appeal, or of the Florida Supreme Court. The Petitioner mistakenly asserts the latter. By misreading the Fourth District's opinion, the Attorney General seeks to have this Court grant discretionary review of a conflict that does not exist, and which conflict is premised solely on *dicta* from the Fourth District's Opinion. Accordingly, this Court should decline to exercise its discretion to review this case.

In deciding the issue raised on appeal of whether the Florida Senate President's Motion to Intervene should have been granted, the Fourth District limited its holding to the to the propriety of the President of the Florida Senate's intervention in this particular gerrymandering claim:

> Finally, we *reverse* the order denying the motion of the President of the Florida Senate to intervene in the action. . . . While we agree that the President of the Florida Senate is not an indispensable party to this gerrymandering claim, we nevertheless do *hold* that he is a proper party, one certainly with a cognizable interest in the action.

(Emphasis supplied.)

The last paragraph and footnote 9 of the Fourth District's Opinion, contain the following dicta:

> The only truly "indispensable" party to an action attacking the constitutionality of Florida legislation—and this Joint Resolution is in the nature of legislation—is the Attorney General.[9]
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>
> [9]*See* § 86.091, Fla. Stat. (2002) (in any action for a declaratory judgment that a statute is unconstitutional the Attorney General shall be served and is entitled to be heard). In this instance we use the term "indispensable party" to mean a party without whom the action cannot proceed. In these reapportionment cases, all the other individual parties are merely proper.

(Emphasis via underlining supplied, italics in original).

It is this dicta, which the Attorney General misconstrues as "requiring the Attorney General to appear and defend whenever the constitutionality of a statute is called into question". (Pet. Jurisd. Brief at 6) That issue was not raised below in the Fourth District; the Fourth District did not rule on such issue; and that is not what the Fourth District said. This dicta merely asserts that in this *reapportionment case*, the Attorney General is indispensable and must be a party to

this action. The rationale for the Fourth District's holding that the President of the Florida Senate is a "proper" party but not an "indispensable party to this gerrymandering claim" is clear when viewed in the context of the entire opinion.

It is also clear from the face of the District Court's opinion that this is not a case about whether the Attorney General is *required* to appear and defend as a matter of course in every proceeding challenging a state statute. By including the plain language of Florida Statute §86.091 in the beginning of footnote 9, the Fourth District has expressly acknowledged that the Attorney General "is entitled to be heard." Such language implies that the Attorney General may choose not to be heard. Neither in this dicta, nor elsewhere in the Fourth District's Opinion, is there a mandate that the Attorney General must defend all challenges to the constitutionality of Florida legislation. That issue simply was not, and is not, presented in this case. In short, there is no decision on a question of law in the Fourth District's Opinion which expressly, directly or otherwise holds that the Attorney General is obligated to appear and defend whenever the constitutionality of a statute is challenged.[2]

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[2] Illustrative of the fallacy of the Attorney General's asserted concern is the Fourth District's recent decision in *G.P. vs. State*, 842 So.2d 1059, 1061 (Fla. 4th DCA 2003) (Notwithstanding the Attorney General's intentional failure to file a contesting brief and to appear at the hearing before the trial court, sections of Florida's adoption law were declared unconstitutional).

Assuming, *arguendo*, that the dicta in this case was deemed to be the holding, that the Attorney General is an indispensable party to a suit challenging the constitutionality of a law apportioning the state's congressional districts, or any other Florida law, still does not expressly and directly conflict with any existing precedent of this Court on the same question of law.[3]

II. THERE IS NO CASE OR CONTROVERSY, AND THIS CASE SHOULD BE DISMISSED

Although the Attorney General's Notice to Invoke was timely, there is no case or controversy for this Court to review, as the Respondents (Petitioners below and Plaintiffs in the trial court) have voluntarily dismissed all adverse parties, subsequent to the issuance of the Mandate by the Fourth District. Since the Attorney General did not move to stay the issuance of the Mandate, the case became final when the Mandate issued and a justiciable case no longer exists as a result of the previously mentioned Notices of Voluntary Dismissal. In short, there is no "case or controversy" for this Court to rule on.

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[3]The Attorney General is always an indispensable party to an action challenging the law of the State of Florida. That he may exercise his discretion, as an officer of the court or as representative of the sovereign, and decline to defend, as in *G.B.*, *supra*, does not diminish the power vested in him to defend the state's laws against constitutional attack. *See* Fla. Stat. 16.01(4) (Attorney General shall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state).

For this Court to render an opinion where no actual case or controversy exists would make such an opinion purely advisory. This Court has long held that the courts should not issue advisory opinions:

> "[E]xcept as otherwise required by the constitution, Florida recognizes a general standing requirement in the sense that every case must involve a real controversy as to the issue or issues presented. See *Interlachen Lakes Estates, Inc. v. Brooks,* 341 So. 2d 993 (Fla. 1976). Put another way, the parties must not be requesting an advisory opinion, id., except in those rare instances in which advisory opinions are authorized by the Constitution. E.g., art. IV, § 1(c), Fla. Const. (advisory opinions to Governor).

Department of Revenue v. David Kuhnlein, 646 So. 2d 717, 721 (Fla. 1994).

Therefore, this Court should dismiss the pending request for the Court to exercise its discretionary jurisdiction.

CONCLUSION

There is no conflict with any decisions of another district court or this Court as the Fourth District did not hold that the Attorney General must appear and defend all actions challenging the constitutionality of all Florida legislation. Whether or not the Attorney General has a duty to appear and defend was not an issue before the lower court. Additionally, there is no case or controversy upon which this Court can exercise its discretionary jurisdiction, as the underlying case has been dismissed.

This Court should decline to exercise its discretion to review this case, and dismiss this case.

Dated: this ____________ day of October, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been served via U.S. Mail on this _________ day of October 2003, to: SEE ATTACHED SERVICE LIST.

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CERTIFICATE REGARDING TYPE STYLE AND SIZE

I HEREBY CERTIFY that this computer-generated Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2), as it is being submitted in Times New Roman 14-point font.

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